UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADVANCEPIERRE FOODS, INC.,

"Respondent"

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 75, AFFILIATED WITH THE UNITED FOOD AND COMMERCIAL WORKERS, INTERNATIONAL UNION,

"Charging Party"

Cases 9-CA-153966
9-CA-153973
9-CA-153986
9-CA-154624
9-CA-156715
9-CA-156746
9-CA-159692
9-CA-160773
9-CA-160779
9-CA-162392

RESPONDENT'S REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Respondent AdvancePierre Foods, Inc. ("Respondent") replies herein to the General Counsel's Answering Brief opposing Respondent's exceptions to the Decision of David I. Goldman. Because of the limitation on the length of its reply, Respondent will focus on the issues most important to it, as well as the most egregious arguments raised by the General Counsel, without waiving those arguments raised in its original Exceptions Brief.

I. RESPONDENT'S VIDEOTAPING AND RAMIREZ'S REVIEWING ARCHIVED VIDEOTAPE WERE NOT UNLAWFUL SURVEILLANCE.

The cameras which recorded the video in question had been in the cafeteria many years before the Union drive, back to 2010 or 2011. (Tr. 562:10-11). Accordingly, APF's videotaping of the lunchroom for years cannot be illegal surveillance just because on June 8, Carmen Cotto happened to be engaged in protected activity there. "The Board also finds it 'neither unlawful nor objectionable when a . . . security camera, operating in its customary matter, happens to record protected concerted activity on videotape.'" *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1841 (2011) (internal citations omitted). The General Counsel chose not to try to distinguish (or even address) the *2 Sisters* case in their Answering Brief. Moreover, Ramirez was not watching the live video on June 8 and just happened to witness Cotto. As Respondent argued in its Brief in support of its Exceptions, pulling and viewing archived videotape to investigate an incident raised by an employee is not surveillance. *Wackenhut Corp.*, 348 NLRB 1290, 1299 (2006). And that is exactly what Ramirez did here.

II. RESPONDENT DID NOT UNLAWFULLY SURVEIL BY ITS REVIEW OF SOCIAL MEDIA.

In its Answering Brief, the General Counsel fails to explain: (1) why Ramirez's *attempt* to listen to publically broadcast information constitutes unlawful surveillance; (2) how a single non-employee's "like" of an advertisement posted by a third party, unaffiliated with either the Union or APF, constitutes protected concerted activity; and (3) how review of a non-employee's

Facebook page constitutes unlawful surveillance under the Act. Additionally, like the ALJ's decision, the General Counsel's Answering Brief suffers from a contradiction of logic. When convenient to their conclusions that Ramirez was surveilling employee activity, the ALJ and General Counsel assume that Yazzmin Trujillo and Diana Concepcion are one in the same. However, after using that assumption to erroneously conclude that Ramirez was surveilling an *employee*, the ALJ concludes and the General Counsel argues that it was unreasonable and unnecessary for APF to require Concepcion to confirm her identity. These conclusions are mutually exclusive and highlight the flaws in the ALJ's decision.

A. Ramirez Never Viewed any Concerted Activity Conducted by Employees.

APF does not dispute that its employees' participation in a radio broadcast regarding the Union was an exercise of their Section 7 rights. However, when those employees intentionally chose to direct their comments to the general public, the Company had a right to listen to those public comments as well. *Stahl Specialty Co.*, 2016 NLRB LEXIS 297 (2016); *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991). The General Counsel has failed to distinguish Ramirez's attempt to listen online to the radio broadcast from any other employer who turns on the television to observe employees' press conferences about union issues, or who flips through the newspaper to read an op-ed about unionization. Indeed, no distinction can be made, because none of these activities, by themselves, are violative of the Act.

Nonetheless, the only evidence in the record is that Ramirez never located the recording of the employee radio broadcast. (Tr. 785:14-786:4; GC Brief 24). Because of this fact, Ramirez was not able to confirm who participated in the radio show, contrary to the statements made in the General Counsel's brief. Nor did Ramirez happen upon any other protected, concerted activity during her review of the LaMega website or Facebook page. The advertisement for the broadcast was posted by the LaMega radio station, not by the Union or by

any APF employee. And the sole individual who "liked" the advertisement, Yazzmin Trujillo, was not employed by APF or even known by Ramirez. There is undisputed evidence in the record that Ramirez knew that Trujillo was not employed by APF, and no evidence was presented by the General Counsel regarding the identity of Trujillo. (Tr. 789:7-19). Importantly, Diana Concepcion denied that she is Trujillo. (Tr. 832:8-10).

The act of posting the ad and "liking" it - - completed only by non-employees - - does not constitute protected, concerted activity. In *Chipotle Mexican Grill*, 2016 NLRB LEXIS 599 (2016), the Board overruled an ALJ's determination that an employee's tweets regarding a news article concerning hourly workers having to work on snow days, tweets directed to the Company's communications director regarding snow days and other tweets replying to comments posted *by customers*, constituted concerted activity. *Chipotle* is in line with prior decisions which have recognized the duality required to find concerted activity. See *Worldmark by Wyndham*, 356 NLRB 765, 766 (2011) (concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action"), *quoting Meyers Industries*, 281 NLRB 882, 887 (1986), *enfd. sub nom., Prill v. NLRB*, 835 F.2d 1481, 266 U.S. App. D.C. 385 (D.C. Cir. 1987); *see also KNTV, Inc.*, 319 NLRB 447, 450 (1995) ("Concerted activity encompasses activity which begins with only a speaker and listener, if that activity appears calculated to induce, prepare for, or otherwise relate to some kind of group action."). Moreover, there can be no unlawful surveillance if there is no protected, concerted activity. *NLRB v. Computed Time Corp.*, 587 F.2d 790 (5th Cir. 1979). This was ignored by both the ALJ and the General Counsel. Simply put, all of the allegations and conclusions flowed from their erroneous conclusion that Ramirez had engaged in unlawful surveillance.

B. Ramirez Did Not Unlawfully Surveil.

The ALJ's conclusion that Ramirez's review of Trujillo's Facebook page constituted unlawful surveillance is equally erroneous. To try to legitimize this incorrect conclusion, the General Counsel's brief proffers a completely false and unsupported statement: "Ramirez believed that the concerted activity was done by an employee." (GC Brief 24). At the time Ramirez clicked on Trujillo's Facebook page, Ramirez knew that Trujillo was not employed by APF. Only after clicking on Trujillo's public pictures did she realize that Concepcion was posing as Trujillo – though Concepcion denies the connection. Thus, at the time that Ramirez clicked on the Facebook page of Trujillo (an unknown person to her), her motivation could not have possibly been to surveil an *employee* or to investigate an *employee's* union activities. Indeed, Trujillo's Facebook page did not contain any references to the Union or her terms and conditions of employment at APF. (R. Ex. 5C-F). Instead, once Ramirez realized that Trujillo and Concepcion were one in the same, Ramirez's sole interest was to confirm that Concepcion is who she claimed to be in her federal immigration identity documents, and that APF was not in violation of federal law by employing someone with false identity documentation. Ramirez did not investigate other employees of APF, Union communications or commentary about Trujillo/Concepcion's employment, as erroneously suggested by the General Counsel. (GC Brief 25). The evidence supports that Ramirez's investigation of Trujillo was done in her capacity as HR Manager, in which she shares responsibility for ensuring APF's compliance with federal law -- contrary to the General Counsel's unsupported argument that Ramirez's interest in Trujillo/Concepcion was because of Concepcion's alleged participation in the radio show. (GC Brief 24). Simply put, the General Counsel's argument makes little sense, as Ramirez logically could not have known that Concepcion was posing as Trujillo when she began the Facebook

inquiry. Thus, at no point during her Facebook review did Ramirez engage in unlawful surveillance of any employees' union activities or sympathies.

III. RESPONDENT'S REQUEST THAT CONCEPCION CONFIRM HER IDENTITY DID NOT VIOLATE THE ACT.

The ALJ and General Counsel are caught in a paradox that plagues the entire decision. As discussed above, to conclude that Ramirez engaged in employee surveillance by clicking on Trujillo's Facebook page, the ALJ and General Counsel had to have assumed that Trujillo is in fact Concepcion. Otherwise, there is simply no surveillance of any APF *employee.* And despite Concepcion's denials that she is Trujillo, this is a reasonable assumption – an assumption that Ramirez eventually made as well. In her Facebook page, Trujillo refers to other Trujillos as her "papi" ("dad"), "hermanito" ("brother") and "Tia" ("aunt"). (R. Ex. 5A-G). Additionally, Ramirez also discovered that Concepcion's HR file indicated that her beneficiary is a Trujillo, who also happens to live with her at the same address. If, as suspected by all involved, Concepcion is Trujillo, then APF was more than reasonable in requesting that Concepcion verify her identity.

Not only does the General Counsel attempt to sweep aside Respondent's federal immigration law compliance obligations, but they misconstrue both the legal requirements and what APF requested of Concepcion. It is plainly clear that it is unlawful for an employer to *continue to employ* an alien with the knowledge that his/her employment is unauthorized. 8 U.S.C. § 1324a(a)(2). Once an employer is on "[n]otice that [initial hiring] documents are incorrect," an employer is obligated to ensure that the alien is authorized. *New El Rey Sausage Co. v. INS*, 925 F.2d 1153,1157-58 (9th Cir. 1991). Importantly (and contrary to the General Counsel's understanding expressed at page 29 of their Brief), 8 U.S.C. § 1324a(a)(2) does not require "reverification," a specific process whereby the employer runs an employee's

documentation back through the E-Verify system. Instead, once information comes to the Company's attention that raises a credible concern about someone's identity, that identity must be confirmed through documentation, outside of reusing the E-Verify system. There was unrefutted testimony from several witnesses that APF did not seek to and did not "re-verify" Concepcion because APF understood that it could not do so. (R. Ex. 12).

Because APF did not seek to or "re-verify" Concepcion, the General Counsel's citation to the Seema Nanda Letter dated December 1, 2011 is inapplicable. (GC Brief 29). That said, the General Counsel fails to acknowledge explicit language in the letter which states: "Other circumstances may also exist for an employer to request additional documentation from an employee. See two previously issued technical assistance letters, dated October 14, 2011, and October 26, 2011, attached, discussing this issue." The October 26, 2011 letter from Seema Nanda details an employer's concern that an employee presented a Social Security card for I-9 purposes that appeared genuine when originally presented, but was later identified in an internal review as not appearing to be genuine. Referring to the aforementioned requirements that an employer could violate 8 U.S.C. § 1324a(a) if that employer knows (or has constructive knowledge) that an employee is not authorized to work, the October 26, 2011 Letter states that "[b]ecause the issue you raise pertains in part to enforcement under 8 U.S.C. § 1324a, OSC cannot state whether an employer has sufficient information to take further action involving a particular employee." If the Office of Special Counsel cannot state whether an employer has sufficient information to request further documentation from an employee under 8 U.S.C. § 1324a, surely the December 1, 2011 Letter cannot be cited by the General Counsel as support for its position, nor should the General Counsel *itself* assert that APF did not have the right to request documentation. Both the General Counsel and the ALJ have stepped well outside the

bounds of their own jurisdiction in attempting to dictate APF's responsibilities (or alleged lack thereof) under federal immigration law. Neither the General Counsel nor the ALJ has the authority to grant APF exception from these legal requirements. And the ALJ's decision is not a "get out of jail free" card on which APF can rely if forced to re-employ Concepcion though she has been unable to provide proper identification.

Not only was APF's request for documentation from Concepcion reasonable, but there is no evidence that APF was motivated by Concepcion's Union sympathies. Concepcion was given multiple opportunities to prove her identity, and was even offered additional time, as well as monetary and other assistance by APF to help her obtain the requested documentation. Instead, the General Counsel argues that APF targeted Concepcion due to her Union sympathies because it mistakenly gave one other employee a verbal warning for violating its solicitation policy (which was retracted the very next day), and gave one employee a verbal warning for violating Good Manufacturing Practices. This simply is not a pattern of conduct which warrants a blanket assumption of retaliation. Concepcion was treated <u>better</u> than other non-union employees who were previously asked to confirm their identity. Finally, the General Counsel's assertion that the request for documentation from Concepcion was unlawful because it spawned from the alleged unlawful surveillance – the fruit of the poisonous tree – is debunked by the fact that there was no unlawful surveillance by Ramirez.

The policy implications of affirming the ALJ's reinstatement remedy for Concepcion are manifest. By affirming the ALJ's decision, and forcing the re-hire of Concepcion without proper documentation, the Board will force APF to employ an individual for whom it has reasonable doubts about her identity.

IV. APF'S ASSESSMENT OF A SINGLE ATTENDANCE POINT TO JESSENIA MALDONADO DID NOT VIOLATE SECTION 8(a)(1) OF THE ACT.

The General Counsel cites *CGLM, Inc.*, 350 NLRB 974 (2007) and *Hospital San Pablo*, 327 NLRB 300 (1998) for the proposition that knowledge of Maldonado's strike participation "may be inferable from circumstances." *Id*. What is lacking in the General Counsel's argument is the circumstances from which, according to the General Counsel, Respondent should have inferred Maldonado's participation. The General Counsel claims that "Respondent had constructive knowledge of Maldonado's participation in the protected activity once other employees called in and left voicemails containing readings of the script," and that combined with "Respondent's knowledge of Maldonado's union support" was a "clear basis" for constructive knowledge. The fallacies behind this argument are many. First, exactly how Respondent can be charged with knowledge that Maldonado engaged in protected concerted activity based on others' phone calls is unclear. If that is true, why was Respondent not charged with that knowledge about the other 15 employees who did not mention the strike in their call offs? Second, the record is devoid of <u>any</u> evidence that Respondent knew Maldonado was a Union supporter. The General Counsel does not point to any record evidence to support its speculation. The irony here, of course, is that Respondent diligently provided for mechanisms to protect the Section 7 rights of those Union supporters who called in to report a strike, such that those who actually called in according to the script or mentioned the strike would not receive an attendance point.

Lastly, the ALJ's reliance on the *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) and *Ideal Dyeing & Finishing Co.*, 300 NLRB 303 (1990) is misplaced. These cases call into question discipline issued in a strike situation based on the good-faith but wrong belief that an employee engaged in protective activity. Here, the converse is true - - this was discipline issued not

because Respondent thought she engaged in protected activity but instead because Respondent believed she did not. Therefore, these cases are inapposite. Moreover, as the Board noted in *Co Con, Inc.*, 238 NLRB 283, 288 (1978), when the employer establishes an honest belief that misconduct occurred, that defense carries the day unless the General Counsel affirmatively establishes that the misconduct did not in fact occur. The General Counsel failed to carry that burden here.

V. RESPONDENT DID NOT EXPRESSLY OR IMPLICITLY PROMISE TO REMEDY GRIEVANCES THROUGH ITS CATS PROGRAM.

In reaching the conclusion that Respondent promised to remedy grievances, the ALJ and General Counsel both relied upon Respondent's response to the Ronnie Fox CATS submission. (G.C. Ex. 15). In his CATS form, Fox complained about the attendance points policy. Ramirez informed him that the Company had been, for some time, reviewing the attendance points system Company-wide. (Tr. 155:19-156:18). The General Counsel argues that Fox was not so informed. His own testimony proves otherwise: "(S)he was saying that they are working on it, and they were trying to get in contact with the other companies to be all, you know, together; so they wanted to have some sort of meeting . . . so they could be all unified as far as what they did about points or occurrences." When asked to clarify what "other companies" meant, Fox quickly admitted Ramirez was referring to Respondent's other plants. (Tr. 156:9-25; 157:1-2).

Ramirez' "work on" comment was the linchpin evidence to support the conclusion that Respondent was promising to remedy the consensus of the employees. This also allowed the ALJ to rely on *Desert Spring Hosp. Med. Center*, 363 NLRB No. 185 (2016) to find CATS to be an unlawful reference of remedial action. APF did not make (and has not made) any change to its attendance policy in response to Fox's CATS submission. (Tr. 732:13-17). "The Board infers improper motive and interference with employers' Section 7 rights when an employer grants

benefits during an organizing campaign without showing a legitimate business reason." *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 1 fn. 2 (2016). APF made that showing through Petra Sterwerf, who testified about the communication void at the plant when she arrived.

VI. RESPONDENT WAS PREVENTED FROM ESTABLISHING CONCEPCION'S LACK OF AUTHORIZATION TO WORK IN THE UNITED STATES.

In response to Respondent's claim that Diana Concepcion is not entitled to backpay because she has not produced evidence of her ability to work lawfully in the United States, the General Counsel cites to two articles from websites that appear to: 1) prohibit an employee from requesting different documents that those permitted to verify eligibility originally; and 2) provide that employers are not permitted to re-verify employees. Respondent agrees with both of these points, and did neither. What Respondent did request of Concepcion is exactly what it previously requested from two other employees - - to bring in from the list of valid verification document items that would resolve good-faith doubts it had about whether the employee was who they claimed to be in their original verification documents. When Respondent attempted to have Concepcion testify as to her actual identity, Respondent was prohibited from inquiring. Because she cannot or has not presented such evidence, an award of backpay, including consequential damages, is inappropriate.

VII. CONCLUSION

For the reasons stated above, Respondent AdvancePierre Foods' exceptions to the Decision of the ALJ remain warranted in fact and law.

Dated this 12th day of September, 2016.

Respectfully submitted,

/s/ Keith P. Spiller

Keith P. Spiller
Megan S. Glowacki
Thompson Hine LLP
312 Walnut Street
Suite 1400
Cincinnati, Ohio 45202
(513) 352-6700
(513) 241-4771
keith.spiller@thompsonhine.com
megan.glowacki@thompsonhine.com

Attorneys for Respondent AdvancePierre Foods, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2016, I electronically filed the foregoing through the National Labor Relations Board website (www.nlrb.gov).

I further certify that a copy of the foregoing was served via U.S. Mail on September 12, 2016 on the following:

Garey Lindsay
Regional Director
National Labor Relations Board
Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

I further certify that a copy of the foregoing was served upon the following via email on September 12, 2016:

Zuzana Murarova (Zuzana.Murarova@nlrb.gov)
Gideon Martin (Gideon.Martin@nlrb.gov)
National Labor Relations Board
Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Pamela M. Newport (pamela.newport@ufcw75.org)
General Counsel, UFCW Local 75
7250 Poe Avenue, Suite 400
Dayton, OH 45414

/s/ Keith P. Spiller
Keith P. Spiller

1057167